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No. 82-556

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

PRESS-ENTERPRISE COMPANY, a California corporation,
Petitioner,

vs.

THE SUPERIOR COURT OF THE STATE OF CALIFORNIA,
FOR THE COUNTY OF RIVERSIDE,
Respondent.

THE PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff,

vs.

ALBERT GREENWOOD BROWN, JR.,
Defendant.

ON WRIT OF CERTIORARI TO THE
COURT OF APPEAL OF THE STATE OF CALIFORNIA,
Fourth Appellate District, Division Two

BRIEF AMICUS CURIAE OF THE CALIFORNIA STATE PUBLIC DEFENDER

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Interest of Amicus Curiae and Consent

The California State Public Defender is a state agency with primary responsibility for the representation on appeal of indigent criminal defendants. (Cal. Govt. Code, § 15421, subd. (a).) California Government Code section 15423 authorizes the State Public Defender to

appear as a friend of the court. We currently represent 31 capital defendants whose automatic appeals are pending before the California Supreme Court (Cal. Pen. Code, § 1239 subd. (b)), including Albert Greenwood Brown, Jr., the defendant in the criminal proceeding from which the instant matter arises. (Cal. Crim. No. 22501.) Of particular relevance to this case, the California State Public Defender was counsel in *Hovey* v. *Superior Court,* 28 Cal.3d 1 (1980), in which the California Supreme Court, exercising its supervisory authority over state criminal procedure, promulgated a rule requiring sequestration of the death-qualification [1] portion of jury selection in capital cases. (*Id.,* at 80.)

The jury selection procedure that was ordered in *Hovey* has provided substantial benefits to all parties in capital trials in California. The Petition for Writ of Certiorari and Brief in Opposition filed by the parties herein suggest that the *Hovey* rule [2] is, at least potentially, in conflict with the First Amendment interests of the press and the public to have access to all phases of capital prosecutions. This is not so. The *Hovey* rule—a state-law rule of criminal procedure—is not implicated in this dispute one way or the other. The trial court rulings at issue here did not apply *Hovey* and were not based on *Hovey.*

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[1] "Death-qualification" refers to the process in "any capital case [in] which prospective jurors [are] excluded for cause because of their attitudes toward the death penalty." (*Hovey* v. *Superior Court, supra,* 28 Cal.3d at 16, fn. 34.)

[2] Although the *Hovey* decision discussed several aspects of the death-qualification process, that portion of the decision requiring sequestered voir dire in capital cases will be referred to in this brief as the "*Hovey* rule."

The interest of the California State Public Defender is to assist in framing the scope of the issues involved in this case. Rather than commenting on the merit of the ultimate question presented, this brief is presented pursuant to rule 36 of the Rules of the Supreme Court of the United States "in support of neither party."

Written consent to the filing of this brief has been given by counsel for petitioner and respondent, respectively, and accompanies the brief.

Summary of Argument

In *Hovey* v. *Superior Court,* 28 Cal.3d 1 (1980), the California Supreme Court ordered that in future capital cases (1) the "portion of the voir dire of each prospective juror which deals with issues which involve death-qualif[ication]" be conducted (2) while each juror is "outside the presence of their fellow venirepersons." (*Id.,* at 80–81.) In the case at bench, reporters employed by petitioner Press-Enterprise were prevented from attending (and subsequently denied access to transcripts of) the entire voir dire.

Petitioner claims that the denial of media access was attributable, at least in part, to the respondent trial court's application of the sequestered voir dire rule of *Hovey,* and that such denial violated its First Amendment right of access to public trials. Respondent counters that its decision complied with the *Hovey* rationale, and that the denial of access was appropriate. In fact, both parties have mischaracterized the issue presented.

Respondent trial court's rulings did not constitute applications of *Hovey,* but rather embodied notions of ju-

ror privacy apart from the *Hovey* rationale. Moreover, assuming arguendo that the trial court intended to base all or part of its rulings on *Hovey,* such "applications" were erroneous, for *Hovey* speaks solely of sequestration of venirepersons *from one another* during the death-qualification process, and does not require or suggest that third parties be excluded. There is no conflict, actual or potential, between the *Hovey* rule and the First Amendment.

Argument

THERE IS NO CONFLICT, ACTUAL OR POTENTIAL, BETWEEN THE REQUIREMENT IN *HOVEY* THAT DEATH-QUALIFYING VOIR DIRE IN CALIFORNIA CAPITAL CASES BE SEQUESTERED, AND THE FIRST AMENDMENT RIGHT OF THE PRESS AND PUBLIC TO ATTEND CAPITAL TRIALS

The California Supreme Court's opinion in *Hovey* v. *Superior Court,* 28 Cal.3d 1 (1980), is primarily devoted to the constitutional propriety of "death-qualifying" capital jurors prior to their determination of guilt or innocence. (*Id.,* at 1-69.) The court concluded, however, that this issue was not ripe for determination. (*Id.,* at 68–69.)[3] In addition, the court announced a new rule of criminal procedure, under its "supervisory authority over California criminal procedure" (*id.,* at 80; fn. omitted): "in future capital cases that portion of the voir dire

[3] A short summary of the *Hovey* opinion and of its legal context is included as an Appendix to this brief.

of each prospective juror which deals with issues which involve death-qualifying the jury should be done individually and in sequestration." (*Ibid.;* fn. omitted.)

This rule of sequestered voir dire was not in dispute in *Hovey;* in fact, "the [California] Attorney General indicated in oral argument that he had 'no objection' [to the rule.] . . . ." (*Id.,* at 80.) The Attorney General noted that sequestration had previously been employed in California cases in which a high degree of pretrial publicity made it preferable to individually voir dire the prospective jurors on their exposure to the publicity in order to avoid contaminating the remaining group of prospective jurors. Sequestered voir dire has proved to be very useful to the courts and to all parties to capital trials in California. The parties to this case—a newspaper and a trial court—now contend that the *Hovey* rule may conflict with the First Amendment, and that its benefits must be balanced against the constitutional harm of excluding the public from capital trials. As amicus will demonstrate, this is not so.

A. *The Hovey Rule Was Not the Basis for Denying the Petitioner Access to the Voir Dire in This Case*

Two issues are raised by the petitioner in this case: (1) Does exclusion of the public from voir dire proceedings in capital cases violate the First Amendment as interpreted by this Court in *Richmond Newspapers, Inc.* v. *Virginia,* 448 U.S. 555 (1980)?; (2) Has the public been denied its constitutional right to attend criminal proceedings through the *application* of *Hovey* v. *Superior Court,* 28 Cal.3d 1 (1980)?

The trial court record, however, reveals a controversy as to the first of these two issues only. Petitioner's written presentations in the two motions and one ex parte application made in the trial court did include arguments that *Hovey* should not be applied to preclude media access. But nowhere in the minute orders denying such motions and application, or in the one transcript available of hearing thereon, is there any indication that the trial court's rulings were predicated on *Hovey* or constituted an "application" thereof. For example, in denying petitioner's motion of December 30, 1981, the trial court stated:

> ". . . I also feel . . . that by a person performing their civic duty as a prospective juror putting their private information as open to the public which I just think there is certain areas [*sic*] that the right to privacy [4] should prevail and a right to a fair trial should prevail and the right of people to know, I think, should have some limitations . . . ." (Reporter's Transcript, page 3990, lines 1–7.)

In its minute order of February 23, 1982, denying petitioner's post-trial ex parte application, the trial court ruled:

> "The jurors were questioned in private relating to past experiences, and while most of the information is dull and boring, some of the jurors had some spe-

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[4] In its Petition for Writ of Certiorari, petitioner notes that during the course of oral argument which resulted in this ruling, counsel for defendant Brown and counsel for the People of the State of California stated that "there was some type of implied agreement between the court and the jurors assuring the latter of the permanent confidentiality of their voir dire examination." (Petn. for Cert. at p. 4.)

cial experiences in sensitive areas that do not appear to be appropriate for public discussion."

It is apparent that the only real controversy in this case is the one noted above as the first issue presented—did denial of media access violate the First Amendment as interpreted in *Richmond Newspapers, Inc.* v. *Virginia,* 448 U.S. 555 (1980)? In *Richmond,* this Court held, "Absent an overriding interest articulated in findings, the trial of a criminal case must be open to the public." (*Id.,* at 581; fn. omitted.) Amicus takes no position on whether "an overriding interest articulated in findings" has been demonstrated in this case.[5] We emphasize, however, that resolution of this issue does not implicate the sequestered voir dire rule of *Hovey.*[6]

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[5] We also take no position on whether the privacy rights of prospective jurors provided such an overriding interest. We can, however, contemplate situations where the nature of the charges are such that effective voir dire will be seriously impaired unless prospective jurors are assured that their candid responses are to remain confidential. In such cases the protection of the defendant's Sixth Amendment right to a fair trial would provide the overriding interest justifying the exclusion of the press and public from portions of the voir dire.

[6] Although the Petition for Writ of Certiorari characterizes petitioner's failure to gain relief in the California Court of Appeal and Supreme Court as "tacit approval" of the "lower court's original order sealing the transcript" (Petn. for Cert. at p. 15), it would be incorrect to view this lack of success as constituting a California appellate pronouncement on *Hovey,* or any other issue. (Indeed, petitioner does not claim that the alleged "tacit approval" was predicated on *Hovey.*) The petition for writ of mandate to the Court of Appeal was denied without issuance of an alternative writ or order to show cause, or any comment thereon. Since many possible grounds exist for such a denial, California courts do not consider it a ruling on the merits; like denials of certiorari by this Court, they have no precedential value. (See *Richer* v. *Superior Court,* 63 Cal.App.3d 748, 755–756 (1976).)

B. *To the Extent the Trial Court May Have Purported to "Apply" the Hovey Rule, Such "Application" Was Erroneous*

In *Hovey,* the California Supreme Court described in great detail the basis for its ruling on sequestered voir dire. The court began by noting Mr. Hovey's contention that death-qualification "create[s] in the minds of jurors certain expectations unfavorable to the accused and predispose[s] the jurors to receive and interpret evidence in ways favorable to the prosecution." (*Hovey* v. *Superior Court, supra,* 28 Cal. 3d at 69; fn. omitted.) The court discussed several reasons which lead it to anticipate that death-qualification would "have an impact on the expectations, perceptions, attitudes, and behavior at trial" on the prospective jurors. (*Id.,* at 70.)

> "In a typical death-qualifying voir dire, the judge and the attorneys repeatedly instruct the jurors about the steps leading to the penalty trial and question each prospective juror, oftentimes at considerable length, concerning his or her attitudes about capital punishment. These repeated displays of concern about the death penalty before any evidence of guilt has been presented may prompt the jurors to infer that the court and counsel assume that the penalty trial will occur." (*Id.,* at 70–71.)

This inference on the part of the jurors may encourage them to vote for guilt, independently of the evidence. (*Id.,* at 71.)

In addition to the risk that the likelihood of votes for *conviction* will be improperly increased because the jurors expect that a penalty trial will occur, the *Hovey* court determined that death-qualification in the presence of other venirepersons also creates a risk that the likelihood of votes for the *death penalty* will be improp-

erly increased. Prospective jurors who see that their fellow venirepersons are excluded when they express opposition to the death penalty may interpret such exclusion "as an indication that the judge in particular and the law in general disapprove of such [anti-death penalty] attitudes." (*Id.*, at 74.) Moreover, voir dire in the presence of the whole panel repeatedly prompts the prospective jurors who are not being questioned to think about the penalty decision they may later be called upon to make. This stimulus may desensitize a prospective juror so that "[w]hat was initially regarded as an onerous choice, inspiring caution and hesitation, may be more readily undertaken simply because of the repeated exposure to the idea of taking a life." (*Id.*, at 75.)

Concerned that the possible "pernicious consequences of [then] current voir dire procedures in capital cases" constitute a "threat . . . to an accused's constitutionally protected interests in a fair trial" (*Id.*, at 79), the California Supreme Court concluded that "[t]he most practical and effective procedure available to minimize the untoward effects of death-qualification is individualized sequestered voir dire." (*Id.*, at 80.)

The primary justification for the rule was that "each individual juror would be exposed to considerably less discussion and questioning about various aspects of the penalty phase before hearing any evidence of guilt." (*Ibid.*) The court did note that since "jurors will be insulated from the influences which the voir dire of their fellow venirepersons may exert . . . [they] may also be more forthright and revealing in their responses." (*Id.*, at 80, fn. 134.) But the court only required that the voir dire be "outside the presence of the other members of the panel" (*ibid.*; see also *id.*, at 81), not outside the presence of the press and public. Lest it be misunder-

stood, the court was careful to note that its "*rule will not in any way affect the open nature of a trial.*" (*Id.*, at 80–81; emphasis added.)

The rule in *Hovey* is a simple, benign, state-law rule of criminal procedure. It is not a constitutional rule, nor does it bear on petitioner's constitutional rights under the First Amendment. The question presented in this case—whether the voir dire process should be "sequestered" *from the public and the media*—is a question wholly separate from the sequestered voir dire ordered in *Hovey*. If, as petitioner contends, the denial of public access was based on the trial court's "application" of *Hovey*, that "application" is unsupported by anything in the *Hovey* opinion and is erroneous.

Conclusion

The exclusion of the public and the press from criminal trials may implicate fundamental constitutional rights of the defendant, the public and the press, and—in some cases—the jurors. Where these rights conflict, the courts will have to weigh them against each other. The resolution of the issue properly presented here—the constitutionality of the exclusion of the public from the voir dire in a capital case—entails such a balancing process. However, contrary to the claims of the parties, the rule of sequestered voir dire announced in *Hovey* has no implications for this issue, and does not impinge on the interests of the petitioner or the public.

Respectfully submitted,

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APPENDIX

SUMMARY OF THE HOLDINGS IN *HOVEY V. SUPERIOR COURT*, 28 Cal.3d 1 (1980)

In *Hovey* v. *Superior Court*, 28 Cal.3d 1 (1980), the California Supreme Court considered a capital defendant's pretrial challenge to the death-qualification of his jury. In its opinion resolving the challenge, the court did the following three things:

First, it denied, for failure of proof, Mr. Hovey's factual contention that death-qualification produces juries that are "conviction-prone" (see *Witherspoon* v. *Illinois*, 391 U.S. 510, 520, fn. 18 (1968)) and are incapable of functioning as impartial and effective decision-makers (see *Ballew* v. *Georgia*, 435 U.S. 223 (1978)). The failure of proof, however, concerned a single issue: the absence from the record of any evidence on the number and the characteristics of jurors who would be excluded from capital trials because they would automatically vote *for* the death penalty in every case—the "automatic death penalty jurors." (*Hovey* v. *Superior Court, supra*, at 63–69.) On every other issue, the California Supreme Court explicitly endorsed Mr. Hovey's factual showing. Specifically, the court found, on the basis of an extensive scientific record: (1) that there is a strong and well-established relationship between attitudes toward the death penalty and propensity to convict (*id.*, at 27–42); (2) that opponents of the death penalty who are excluded from jury service in capital cases pursuant to *Witherspoon* have attitudes that distinguish them from the remaining pool of jurors (*id.*, at 43–54); and (3) that women and blacks are disproportionately excluded by this process because of their opposition to the death penalty (*id.*, at 54–57).

Second, the California Supreme Court specifically

noted that there is a separate and independent basis for asserting the unconstitutionality of death-qualification: that it excludes a "cognizable class" from the jury pool, and therefore denies the defendant his right to trial by a jury drawn from a representative cross-section of the community as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution. This argument had not been raised in the *Hovey* case, and the court intimated no opinion on its merits. (*Id.*, at 17–18, fn. 38; 20, fn. 45.)

Third, the court ordered, "pursuant to its supervisory authority over California criminal procedure, that in future capital cases that portion of the voir dire of each prospective juror which deals with issues which involve death-qualifying the jury should be done individually and in sequestration." (*Id.*, at 80; fns. omitted.)

The first two issues discussed in *Hovey* have also been litigated in other cases. In the Fifth Circuit, some of these claims were rejected as a matter of law: *Spinkellink* v. *Wainwright,* 578 F.2d 582 (5th Cir. 1978), cert. denied 440 U.S. 976; *Smith* v. *Balkcom,* 660 F.2d 573 (5th Cir., Unit B 1981), modified on rehearing, 671 F.2d 858 (5th Cir., Unit B 1982), cert. denied, ____ U.S. ____ [74 L.Ed.2d 148] (1982). The Eighth Circuit, on the other hand, has taken a contrary position, and in 1980 remanded a case to the District Court for an evidentiary hearing at which the defendant could attempt to prove the factual bases for his constitutional claims. (*Grigsby* v. *Mabry,* 637 F.2d 525 (8th Cir. 1980).) Amicus is informed that an extensive evidentiary hearing was subsequently held before The Honorable Garnett T. Eisele, chief judge of the federal District Court for the Eastern District of Arkansas, and that the matter has been under submission for several months. Ultimately, the resolution of these issues may rest with this Honorable Court.

The third issue discussed in *Hovey*—the rule of sequestered voir dire—is the one that is, supposedly, at issue in this case. It is not a constitutional rule, and it has not, to the knowledge of amicus, been litigated outside California.